

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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L. FOSTER CONSULTING, LLC )  
Plaintiff, ) Civil Action No. 1:11cv815 (LMB)(JFA)  
v. )  
XL GROUP, INC. )  
Defendant. )  
\_\_\_\_\_  
)

**PLAINTIFF L. FOSTER CONSULTING LLC'S SUR-REPLY  
TO XL GROUP, INC.'S MOTION TO DISMISS OR TRANSFER**

Pursuant to this Court's Order on November 29, 2011, Plaintiff L. Foster Consulting LLC ("Foster Consulting"), by counsel, hereby files this Sur-Reply with respect to the Motion to Dismiss or Transfer and the Reply filed by Defendant XL Group, Inc. ("XL Group"). This Sur-Reply is submitted to make the Court aware of materially false statements contained in XL Group's Reply and the accompanying sworn declaration by Paul Schmucker, XL Group's President. Before filing this Sur-Reply, Foster Consulting asked that XL Group correct these misstatements and XL Group declined to do so.

**The False Statements In XL Group's Reply and Declaration**

In trying to argue that Pennsylvania is a more convenient forum for XL Group and its counsel, XL Group's Reply asserts that XL Group would be represented in this case by a Pennsylvania lawyer, Grace Deon, Esq., except for the fact that Foster Consulting chose to file suit in the U.S. District Court for the Eastern District of Virginia. XL Group describes:

XL Group was forced to hire King & Spalding to represent it in this matter because Ms. Deon is not admitted to practice in this District and it would have

been costly and inefficient for XL Group to have Ms. Deon litigate the case with King & Spalding, or another firm, acting as local counsel.

Reply at 5 (citing Schmucker Decl. ¶ 5). In Mr. Schmucker's accompanying sworn declaration, he adds:

On August 23, 2010, ... I retained Grace Deon, Esq. of Eastburn & Gray to represent XL Group. .... Ms. Deon also had direct correspondence with Foster Consulting's counsel, Venable LLP, on numerous occasions. Ms. Deon works in Eastburn & Gray's Doylestown, Pennsylvania office, which is approximately 173 miles from the Alexandria Division courthouse.

As a result of Foster Consulting filing its Complaint in the Eastern District of Virginia, Alexandria Division, XL Group hired King & Spalding LLP to represent XL Group in this matter because Ms. Deon is not admitted to practice in this District. It would have been inefficient for XL Group to be represented by Ms. Deon and local counsel. XL Group did not wish to terminate Ms. Deon's representation[.]

P. Schmucker Declaration at ¶ 2-5. These statements are not correct. This is confirmed by Mr. Schmucker's August 8 – 9, 2011 emails to Foster Consulting's counsel. The truth is that, before XL Group even knew about the suit, XL Group had terminated Ms. Deon as its counsel.

#### **The Truth Revealed By Mr. Schmucker's August 8 and 9, 2011 Emails**

XL Group's Reply and the accompanying declaration from XL Group's President, Mr. Schmucker, are contradicted by his August 8 and 9, 2011 emails. On Monday, August 8, 2011, XL Group's President wrote Foster Consulting's counsel, stating:

**I am no longer represented by Grace Deon, to which you sent a letter on this matter last April 28, 2011. I would appreciate a telephone call with you at your earliest convenience to review the basis of XL's case, as well as a possible settlement. My attorney was supposed to be pursuing both of these topics with your firm, but has obviously failed to do so. That's why I have stepped in at this point.**

*See* P. Schmucker 8/8/11 email (emphasis added), attached as Exhibit 1. Later that day, Mr. Schmucker spoke by telephone with Foster Consulting's counsel and confirmed that XL Group had terminated Ms. Deon due to dissatisfaction with her performance. When Foster Consulting's

counsel advised Mr. Schmucker that suit had been filed against XL Group, Mr. Schmucker then expressed complete surprise to learn this. The next morning, on Tuesday, August 9, 2011, Mr. Schmucker again wrote Foster Consulting's counsel, stating:

**Thank you for taking the time to speak with me yesterday. I spoke with you being unaware that you have filed a complaint against XL, believing that we were still attempting to meet to review our respective positions.** Having once learned of the filing from you I should have ended the conversation.

*See* P. Schmucker 8/9/11 email (emphasis added), attached as Exhibit 2. From review of Mr. Schmucker's August 8 and 9, 2011 emails, it is clear that XL Group's Reply and Mr. Schmucker's sworn declaration contain false statements. Mr. Schmucker's emails reveal that XL Group's decision to terminate Ms. Deon as its counsel had nothing at all to do with where this suit was filed. Ms. Deon was terminated before XL Group even knew about the suit.

#### **Foster Consulting Requested That XL Group Correct The Record**

Foster Consulting did not want to raise XL Group's misstatements with the Court. However, Mr. Schmucker's sworn declaration, including the statement "XL Group did not wish to terminate Ms. Deon's representation," is false. Likewise, the Reply's statement that "XL Group was forced to hire King & Spalding to represent it in this matter because Ms. Deon is not admitted to practice in this District" is false.

On Monday, November 21, 2011, Foster Consulting's counsel brought these misstatements to the attention of XL Group's counsel and requested that XL Group correct the record. *See* 11/21/11 – 11/22/11 emails, attached as Exhibit 3. The next day, XL Group's counsel responded that Mr. Schmucker's declaration was truthful and that he actually was aware of the suit as of August 4, 2011 because he then received an unsolicited letter from a lawyer advising him of the suit and seeking to represent XL Group in the suit. *Id.* This response only raises more questions, including questions about XL Group's President's credibility.

This response does not explain why Mr. Schmucker wrote Foster Consulting's counsel on August 8, 2011 to state that Ms. Deon had been terminated due to dissatisfaction with her performance. Nor does this response explain why Mr. Schmucker wrote on August 9, 2011 to state that, until speaking with Foster Consulting's counsel on August 8, he was unaware that suit had been filed. Most importantly, this response does nothing to corroborate the statements to this Court that "XL Group did not wish to terminate Ms. Deon's representation" or that "XL Group was forced to hire King & Spalding to represent it in this matter because Ms. Deon is not admitted to practice in this District." This is not what Mr. Schmucker said at the time.

There is no way to reconcile XL Group's Reply and Mr. Schmucker's sworn declaration with the straightforward statements in Mr. Schmucker's August 8 and 9, 2011 emails. Accepting Mr. Schmucker's August 8 and 9, 2011 emails as true, XL Group's Reply and Mr. Schmucker's sworn declaration contain materially false statements which should not be credited by this Court.

Dated: November 29, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 29, 2011, a copy of Plaintiff's Sur-Reply was served through the Court's electronic filing system ("ECF") which will cause a notice of electronic filing ("NEF") to be sent to counsel for the Defendant:

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